



The Municipal Corporation of the Town of Fort Erie

By-law No. 23-2020

Being a By-law to Authorize the Entry into a Communications Access Agreement with Niagara Regional Broadband Network Limited

Whereas in accordance with By-law No. 192-04, The Corporation of the Town of Fort Erie entered into a Municipal Access Agreement with Niagara Regional Broadband Limited for the installation and maintenance of a fiber-optic communications network within the municipal road allowances, which agreement expired in September 2014; and

Whereas Niagara Regional Broadband Network Limited put forward a new form of agreement for consideration by The Corporation of the Town of Fort Erie; and

Whereas Report No. IS-03-2020 was considered and approved at the Council-in-Committee Meeting held on February 10, 2020, to authorize the entry into a Communications Access Agreement with Niagara Regional Broadband Network Limited for the installation and maintenance of a fiber-optic communications network within municipal road allowances; and

Whereas it is deemed desirable to enter into a Communications Access Agreement with Niagara Regional Broadband Network Limited for the installation and maintenance of a fiber-optic communications network within municipal road allowances;

Now therefore the Municipal Council of The Corporation of the Town of Fort Erie enacts as follows:

1. **That** the entry into a Communications Access Agreement with Niagara Regional Broadband Network Limited for the installation and maintenance of a fiber-optic communications network within municipal road allowances, in the form of Schedule "A" attached to and forming part of this by-law, is authorized and approved.
2. **That** the Mayor and Clerk are authorized and directed to execute the Communications Access Agreement, in a form satisfactory to the Town Solicitor, and to affix the corporate seal thereto.
3. **That** the Clerk of the Town is authorized to effect any minor modifications, corrections or omissions, solely of an administrative, numerical, grammatical, semantical or descriptive nature to this by-law or its schedules after the passage of this by-law.

Read a first, second and third time and finally passed this 18th day of February, 2020.

Mayor

Clerk

COMMUNICATIONS ACCESS AGREEMENT

THIS AGREEMENT made this 1st day of January 2020

B E T W E E N:

THE CORPORATION OF THE TOWN OF FORT ERIE
(hereinafter called the "Town")

of the FIRST PART

- and -

NIAGARA REGIONAL BROADBAND NETWORK LIMITED
(hereinafter called the "Company")

of the SECOND PART

WHEREAS the Company operates a fibre optic network for communications purposes;

AND WHEREAS the Company is regulated by the Canadian Radio-Television and Telecommunications Commission to operate in the geographic area designated in the Company's license, which area includes all or a portion of the lands within the geographic boundaries of the Town;

AND WHEREAS the Town owns and operates public highways within its geographic boundaries;

AND WHEREAS the Company wishes to install and maintain wires, fibre optic cables, ducts, conduits, manholes and other accessories, structures and equipment (collectively, the "Equipment") in, on, under, over, along or across the said highways (singularly a "Service Corridor" and collectively, the "Service Corridors");

AND WHEREAS the Town is willing to permit such use of its Service Corridors under the conditions set out herein and in the attached Schedules;

NOW THEREFORE in consideration of the sum of TWO (\$2) DOLLARS paid by the Company to the Town and of the mutual covenants herein contained, the Town and the Company agree with each other as follows:

1. General grant of permission

- 1.1 The Town hereby agrees to permit the Company to use the Service Corridors for the purpose of installing, maintaining, using and eventually removing the Equipment, subject to the terms and conditions hereinafter set forth and in accordance with all federal, provincial and municipal statutes, regulations, laws and by-laws or other rules pertaining to the use of the Service Corridors or the Equipment for the term specified in Section 2.1.
- 1.2 Neither this Agreement nor any use of any Service Corridor under this Agreement or permit, nor any other action or inaction shall create or vest in the Company any ownership or property rights in any part of a Service Corridor, and the Company shall be and remain a mere non-exclusive licensee of the Service Corridor.

- 1.3 The Company shall desist always from any registration of this Agreement or of any right howsoever arising under it.
- 1.4 Nothing in this Agreement shall be construed as affecting any rights or permissions of anyone else not a party to this Agreement, to use any Service Corridor.
- 1.5 Placement of the Equipment in a Service Corridor shall not create or vest in the Town any ownership in or property rights to the Equipment.
- 1.6 The Town has made and makes no representations or warranties as to the state or condition (including environmental condition) of the Service Corridors above or below the surface, or the suitability of the Service Corridors for any business, activity or purpose whatsoever and the Company hereby agrees to accept the condition of the Service Corridors on an "as is" basis.

2. Term

- 2.1 This Agreement shall commence on January 1, 2020 and shall terminate on December 31, 2030. The Agreement may be renewed upon mutual written agreement of the Parties for up to an additional five (5) year period.
- 2.2 The Company and the Town shall initiate discussions on a renewal of this agreement no sooner than June 1, 2029.

3. Specific permits

- 3.1 Whenever the Company wishes to carry out any installation, maintenance or removal of Equipment in, on, under, over, along or across a Service Corridor, it shall apply to the Town for a permit authorizing the specific work contemplated.
- 3.2 Without restricting the generality of the foregoing, the Company must obtain a permit in any case when it contemplates making a physical entry onto a Service Corridor which would require traffic control for safety purposes or which would require making a cut or digging into the surface of a Service Corridor, but need not obtain a permit in any case when it contemplates no interference with traffic and no physical cutting or digging of the surface of a Service Corridor.
- 3.3 When a permit is required, prior to commencing work of any kind in, on, under, over, along or across a Service Corridor, the Company shall obtain a written permit from the Town's Director of Infrastructure Services or his/her designate (herein called the "Director"). As conditions for the issuance of such permit the Director may require:
 - (a) the submission of plans setting out the location of the Equipment within the Service Corridor; and
 - (b) such other terms and conditions as the Director may consider necessary and appropriate.
- 3.4 In considering an application for a permit, the Director may request the Company to provide excess duct capacity at the time of installation provided that the Town does not unreasonably delay issuance of the permit and that the installation of such excess duct capacity is reasonably technically feasible. The Company shall maintain title and ownership and grant the Town a free license to and installation including a 15% administration fee. The Town agrees to pay the prorated share of any future maintenance cost.

- 3.5 Save for such special arrangements as provided for above, the Company shall be solely responsible for all excavation, installation, maintenance and removal of Equipment, including all costs of such work except for special shared cost arrangements as noted in Section 3.4.
- 3.6 The Company shall carry out all work in the Service Corridors, strictly in accordance with the relevant permits.
- 3.7 Permits granted pursuant to this agreement shall be subject to an expiry date, being six months from the date of issuance of each such permit, whether or not specified on the permit. Upon request by the Company in writing, the Town may extend a permit beyond its expiry date by notice in writing to the Company.
- 3.8 The Company covenants and agrees to pay to the Town at the time of submission of each application for a permit under Section 3 herein, an administrative processing fee of \$400.00 per installation plus Harmonized Goods and Services taxes and any other applicable tax.

4. Obligations of the Company

- 4.1 Forthwith after execution of this Agreement by the Company, the Company shall provide the Town with an Irrevocable Letter of Credit in a form satisfactory to the Town Solicitor to ensure performance of the Company's obligations under this Agreement. Such Letter of Credit shall be in an amount of \$10,000.00. This amount may be drawn upon if the Company fails to carry out its obligations pursuant to this Agreement. Further, the Company agrees to be responsible to ensure that the amount of the security held by the Town is maintained at \$10,000.00. Any unused portion of the security shall be returned within one year after the termination date of this Agreement.
- 4.2 (1) The Town may create a joint planning and co-ordination committee with various parties, including the Company, having physical plant located within the Town's highways and other lands. If such a committee is created, the Company shall participate in it and shall contribute to its costs.
- (2) The Company shall become and remain a member of the municipal utility locate notification system used by the Town from time to time during the term of this Agreement.
- (3) Upon receiving a request from the Corporation, the Company shall provide locations of its equipment making all reasonable attempts to complete the requirements of Ontario One Call Section 1 within five business days of the day the Company receives the request from the Corporation about the proposed excavation or dig, unless there is a reasonable expectation that the excavation or dig will not start within 30 business days of the day that the Corporation receives the notification.
- 4.3 (1) The Company represents and warrants and covenants and agrees that after completion of any work related to the excavation, installation, maintenance, repair, replacement or removal of the Equipment, the Company shall restore the Service Corridor to substantially the same condition as prior to the work, and leave the Service Corridor in a sanitary, neat, tidy, and safe condition and free from nuisance, all to the satisfaction of the Director.
- (2) If the Company fails to repair and restore a Service Corridor to the satisfaction of the Director within five (5) days of being notified by the Town, the Town may affect such repairs and charge all Town costs related thereto to the Company. In addition to the foregoing, in the case of asphalt and concrete restoration work, the Company shall immediately advise the Town of any Service Corridor requiring restoration work and such work may be carried

out by the Town and all Town costs related thereto shall be paid by the Company forthwith upon receipt of an invoice from the Town. For the purposes of this section "Town costs" shall mean the Town's actual time and materials costs for the work.

- (3) If a survey monument is disturbed or removed, as a result of the Company's activities, the Company shall have the survey monument replaced by a Certified Ontario Land Surveyor at the Company's expense.

4.4 Upon receipt of at least one hundred and twenty (120) days' notice from the Town, the Company shall relocate its Equipment within a Service Corridor, or perform any other work in connection with the Service Corridor as may be required by the Town for Town purposes or at law. The costs of such relocation shall be shared as follows:

- (a) If the relocation takes place within 5 years after the date when the Town approved placement of the Equipment at that location, then the Town shall pay 100% of the costs of such relocation;
- (b) If the relocation takes place at least five years and up to ten years after the date when the Town approved placement of the Equipment at that location, then the Town and the Company shall each pay 50% of the costs of such relocation; and
- (c) If the relocation takes place ten years or more after the date when the Town approved placement of the Equipment at that location, then the Company shall pay 100% of the costs of such relocation.

The Town shall make a good faith effort to avoid the requirement provided that for the Company to relocate equipment. In the event that Company relocations are required to accommodate 3rd party projects, it will be expected that 3rd party funds shall pay for such relocations. Provided that in cases of emergency, after first making a reasonable attempt to contact the Company and whether or not an Equipment locate has been obtained from the Company, the Town may take any measures deemed necessary for public safety or the public interest with respect to the Equipment that may be required in the circumstances as the Town shall in its sole discretion, acting reasonably, determine, and the Company shall forthwith reimburse the Town for the Company's share of all actual expenses thereby incurred.

4.5 The portions of the Equipment which pass over or under existing utilities or cross beneath streets shall be placed in a carrier pipe or be encased in concrete and shall not place substantial point loading or bear directly on any existing pipe, conduit or structure.

4.6 If the Town requires the excavation, installation, maintenance or removal of any Equipment to be stopped for any reasonable reason identified by the Director, the Company shall cease all such excavation, installation, maintenance, or removal forthwith upon receipt of notice from the Town. Within three (3) business days of issuing a stop work order under this subsection, the Director shall provide written reasons for such order to the Company.

4.7 The Company, at its own sole expense, shall provide to the Town, within two months of completing the installation of any of the Equipment, "as built" record drawings in an electronic format compatible with the Town's corporate geographic information system and satisfactory to the Director. Upon request by the Company, digital ortho-imagery and/or mapping may be provided, where available, to the Company by the Town at the Company's expense.

4.8 The Company shall promptly pay all taxes, levies and charges, including any Harmonized Goods and Services taxes and including business assessment

or grant-in-lieu, as may apply to the Equipment or the use of the Service Corridors for the Equipment.

- 4.9 Upon request by the Town, the parties shall forthwith enter into good faith negotiations to agree upon the terms and conditions under which the Company shall permit installations from time to time of equipment of the Town together with the Company's Equipment in the trenches, ducts or other means of installation of the Company.
- 4.10 The Company shall not suffer or permit any lien to be delivered or filed in respect of, or registered against the Service Corridors or any part of them.

5. Assignment

- 5.1 This Agreement may be sublicensed, granted, transferred or assigned:
 - (a) by the Town or the Company in its entirety, to a single sublicensee, grantee, transferee or assignee with the other's prior consent in writing, which consent shall not be unreasonably withheld; or
 - (b) by the Company in part to no more than three other parties during the term of this Agreement without the Town's prior consent in writing provided that:
 - (i) the Company first gives notice to the Town of the sublicense, grant, transfer or assignment;
 - (ii) the sublicensee, grantee, transferee or assignee is an affiliate of the Company within the meaning of the *Business Corporations Act (Ontario)* as amended from time to time;
 - (iii) despite the sublicense, grant, transfer or assignment of this Agreement in part by the Company, the Company remains fully responsible to the Town for fulfillment of the obligations and liabilities of the Company described in this Agreement regardless of whether the obligations or liabilities arise out of any acts or omissions by the sublicensee, grantee, transferee or assignee; and
 - (iv) the sublicensee, grantee, transferee or assignee is regulated by the Canadian Radio-Television and Telecommunications Commission.
- 5.2 The Company may pledge the permission granted by this Agreement as security without the consent of the Town to any person directly or indirectly providing financing to the Company, but such pledge shall not release the Company from its obligations and liabilities under this Agreement.

6. Insurance and indemnification

- 6.1 The Company shall maintain insurance in sufficient amount and description as will protect the Company and the Town from claims for damages, personal injury including death, and property damage which may arise from the Company's operations in the Town under this Agreement, including without limitation the use or maintenance of the Equipment on or in the Service Corridors or any act or omission of the Company's agents or employees while engaged in the work of excavating, placing, maintaining, using, renewing or removing the Equipment and such coverage shall include all costs, charges and expenses reasonably incurred with respect to any injury or damage.
- 6.2 In addition to the foregoing the Company covenants and agrees that:
 - (a) the Company shall maintain at its expense during the term of this Agreement comprehensive general liability occurrence-based insurance coverage with an insurer licensed to sell insurance in Ontario covering

claims and expenses for liability for Personal Injury, Bodily Injury and Property Damage in an amount of not less than Five Million (\$5,000,000.00) Dollars per claim exclusive of interest and costs and such insurance coverage shall include the contractual obligations of the Company as stated within this Agreement and name the Town as an additional insured;

- (b) all policies shall provide that they are primary insurance which shall not call into contribution any other insurance available to the Town, provide a waiver of subrogation, provide for severability of interests, and further provide that such insurance shall not be cancelled, lapsed or materially changed to the detriment of the Town, acting reasonably, without at least thirty (30) days' notice to the Town by registered mail;
 - (c) the insurance coverage required under this Agreement shall not be construed to, and shall in no manner, limit or restrict the Company's liability or obligations under this Agreement; and
 - (d) forthwith upon the execution of this Agreement by the Company, the Company shall provide the Town with certificates of insurance evidencing the insurance coverage required by this Agreement in a form satisfactory to the Town Solicitor and thereafter renewals of such insurance coverage.
- 6.3 The Company shall at its own expense procure and carry or cause to be produced and carried and paid for, full Workplace Safety and Insurance Board coverage for itself and all workers, employees, servants and others engaged in or upon any work within the Service Corridors.
- 6.4 The Company covenants and agrees to indemnify, defend, release and save harmless the Town, its agents, officers, elected officials, employees and assigns from and against all losses, claims, including without limitation claims for injurious affection, charges, damages and expenses which the Town may at any time or times bear, sustain or suffer, by reason, or on account of the placement, installation, relocation, maintenance or use of the Equipment in, on, under, over, along or across a Service Corridor, and the Company shall, upon demand by the Town and at the Company's own sole risk and expense, defend any and all suits, actions or other legal proceedings which may be brought or instituted by third persons against the Town on any such claim, demand or cause of action, and shall pay and satisfy any judgment or decree which may be rendered against the Town in any such suit, action or other legal proceeding, and shall reimburse the Town for any and all legal expenses on a solicitor-client basis incurred in connection therewith. The Company's obligation to indemnify, defend and save harmless the Town shall survive the termination of this Agreement.

7. Remedies

- 7.1 If the Company fails to complete the relocation of Equipment in accordance with this Agreement or fails to repair the Service Corridors or do anything else required of the Company pursuant to this Agreement in a timely and expeditious manner to the satisfaction of the Director, acting reasonably, the Town may, but is not obligated to, at its option complete such relocation or repair and the Company shall pay the cost of such relocation or repair to the Town forthwith upon receipt by the Company of an invoice setting out such costs.
- 7.2 (1) Should the Company or the Town materially fail to carry out any of the terms, covenants or conditions herein contained or default in any of its obligations under the terms hereof and fail within thirty (30) days after receiving written notice from the other party to correct any such failure capable of correction,

then this Agreement may, at the option of the non-defaulting party, thereupon be terminated by giving written notice to be effective upon receipt, provided that the Company shall continue to be liable to the Town for all payments due and obligations incurred under the Agreement prior to such termination.

(2) Despite the foregoing, this Agreement may be terminated immediately and without prior notice by the Town in the event that:

- (a) the Company becomes insolvent, makes an assignment for the benefit of its creditors, has a liquidator, receiver or trustee in bankruptcy appointed for it or becomes voluntarily subject as a debtor to the provisions of the *Winding Up Act*, the *Companies' Creditors Arrangement Act*, or the *Bankruptcy and Insolvency Act*, all as amended from time to time, or any successor legislation;
- (b) the Company transfers, assigns, or sublicenses any part or all of its interest in this Agreement other than in accordance with the provisions of this Agreement, or attempts to do same;
- (c) the Company ceases to be licensed as a Canadian carrier or distribution undertaking within the meaning of the *Telecommunications Act*, as amended from time to time, or any successor legislation; or
- (d) the Company violates any law or by-law in connection with the use of a Service Corridor and fails to remedy the violation to the satisfaction of the Director, acting reasonably, in an expedient manner.

(3) If this Agreement is terminated by the Town, the Town's rights in respect of all the unfulfilled covenants, indemnities and obligations of the Company hereunder shall survive such termination.

7.3 Except in the case of gross negligence by the Town, the Town is not responsible, either directly or indirectly, for any damage to the Equipment howsoever caused that may occur during its excavation, installation, maintenance or removal by the Company. The Town shall be liable to the Company for repairing any Equipment damaged on account of any actions or omissions of the Town, its officers, employees, contractors or agents, working in, on, under, over, along, and across its highways and Service Corridors or otherwise. However, subject to the other provisions of this agreement, the Town and the Company shall not be liable to each other in any way for any other losses, claims, charges, damages and expenses whatsoever including, without limitation, claims for loss of revenue or loss of profits, or indirect or consequential damages.

8. Amendments

8.1 (1) If at any time subsequent to the entering into of this Agreement:

- (a) the provincial or federal government or a regulatory authority, acting within its jurisdiction, enacts or repeals any legislation or regulation, or orders, directs or mandates anything which pertains to the subject matter of this Agreement; or
- (b) there is rendered any decision of a court of final appeal or tribunal which pertains to the subject matter of this Agreement,

then either party may notify the other of its intention to require the other party to enter into good faith negotiations to amend this Agreement or to enter into a new agreement reflecting such legislative or regulatory action or court or tribunal decision, as the case may be, within thirty (30) days after written notice (the "Notice") from the notifying party and any newly permitted charges

or fees pursuant to such new or amended agreement shall take effect from the date upon which the Notice expires.

- (2) If the parties are unable to re-negotiate the terms and conditions of this new or amended agreement as provided for above, then the unresolved matters may, with at least thirty (30) days' prior written notice from the requesting party, be referred by the party to the CRTC or to arbitration for resolution, in accordance with the *Arbitration Act, 1991* as amended or its successor legislation. Subject to the right to refer the matter to the CRTC or to request arbitration, if an amendment or new agreement is not reached within ninety (90) days from the date on which the Notice is received, either party may terminate this Agreement without further notice and both parties shall fulfill their respective obligations thereafter in accordance with this Agreement.

9. Notices

- 9.1 The Company shall provide to the Director a list of emergency contact personnel for the Company in southern Ontario available at all times and shall ensure that the aforementioned list is always current.
- 9.2 Any notice required or permitted to be given hereunder or any tender or delivery of documents may be sufficiently given by personal delivery or, if other than the delivery of an original document, by facsimile transmission to the Town at the following address:

The Town of Fort Erie
1 Municipal Centre Drive
Fort Erie, Ontario L2A 2S6
Attention: Director of Infrastructure Services
FAX: (905) 871-6411

And to the Company at the following address:

NIAGARA REGIONAL BROADBAND NETWORK LIMITED
4343 Morrison Street
Niagara Falls, Ontario, L2E 6Z9

ATTENTION: Field Operations Manager
Telephone: 1-877-331-6726
Facsimile: N/A

Either party may change its address for service by serving a notice on the other party in the manner herein provided.

Any notice may also be given by prepaid registered mail mailed within the Province of Ontario and such notice shall be effective five (5) days following the date of mailing, except in the event that there shall be a disruption in postal services at the date of mailing, in which case notice shall be effective by personal delivery or a facsimile transmission followed by receipt of original notice within five (5) days of transmission as stated above.

10. General

- 10.1 This Agreement is the entire agreement between the Town and the Company regarding the subject matter of this Agreement and it can be amended or supplemented only by a document executed in writing by both the Town and the Company.

- 10.2 If any term of this Agreement is found to be invalid, illegal, or unenforceable by a court having the jurisdiction to do so, that term is to be considered to have been severed from the rest of this Agreement and the rest of this Agreement remains in force unaffected by that finding or by the severance of that term.
- 10.3 No alleged waiver or breach of this Agreement is effective unless it is an express waiver in writing of the breach in respect of which it is asserted against the party alleged to have given the waiver. No waiver by a party of any breach of this Agreement operates as a waiver of any other breach of this Agreement.
- 10.4 In this Agreement, unless the context otherwise requires, the singular includes the plural and the masculine includes the feminine gender and a corporation.
- 10.5 This Agreement shall be binding upon and shall enure to the benefit of the parties hereto and their respective permitted successors and assigns.

IN WITNESS WHEREOF the parties hereto have executed this Agreement by their duly authorized representatives.

SIGNED, SEALED AND
DELIVERED

) THE CORPORATION OF THE TOWN OF FORT ERIE

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NIAGARA REGIONAL BROADBAND NETWORK
LIMITED

Date of Execution

THE CORPORATION OF THE TOWN OF FORT
ERIE

- and -

NIAGARA REGIONAL BROADBAND NETWORK
LIMITED

AGREEMENT

Recitals and Schedules

SCHEDULE A PERMITS REQUIRED BY MUNICIPALITY

WORK ACTIVITY	MC	ROP	Notifica- tion only	No Permit or Notification
Any installation of Plant that requires Excavation in the ROW, including: <ul style="list-style-type: none"> – the installation of buried Plant crossing a road; – the installation of new Above-ground Equipment; – the relocation of buried Plant or Above-ground Equipment; – the replacement of existing Above-ground Equipment with equipment that is significantly larger; and – the installation of buried Service Drops that cross a road or a break a hard surface of the ROW. 	X	X		
The installation of aerial Plant (excluding aerial Service Drops)		X		
Tree trimming on ROWs		X		
The replacement of existing Above-ground Equipment without adding more Plant or significantly increasing its size (pole replacements excluded)			X	
The installation of buried Service Drops that do not cross a road or break the hard surface of a ROW			X	
Pulling cable through existing underground duct				X
The installation of or repair to aerial Service Drops				X
The maintenance, testing and repair of Plant where there is minimal physical disturbance or changes to the ROW				X
Any other Work activity agreed to by the Municipality				X

MC – Municipal Consent ROP – Road Occupancy Permit